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No. 92-1189

IN THE
Supreme Court of the United States
OCTOBER TERM, 1992

COLUMBUS-AMERICA DISCOVERY GROUP, INC.,
Petitioner,

v.

ATLANTIC MUTUAL INSURANCE COMPANY, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE AND BRIEF AMICUS CURIAE OF THE OHIO STATE UNIVERSITY IN SUPPORT OF PETITIONER

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MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE OF THE OHIO STATE UNIVERSITY IN SUPPORT OF PETITIONER

The Ohio State University hereby moves, pursuant to Rule 37.2 of the Rules of this Court, for leave to file the attached brief as *amicus curiae.* Counsel for the petitioner has consented to the filing of this brief; counsel for the respondents have refused consent.

The Ohio State University is a public institution of higher learning whose main campus is in Columbus, Ohio. The University has 4,461 faculty members and approxi-

mately 58,585 students in its various colleges and graduate schools. Since its founding in 1870, The Ohio State University has sought to encourage learning, research, and the dissemination of knowledge in virtually all fields of study, including social science, physical science, liberal arts, the professions, business, and finance.

Shipwrecks offer opportunities for research in many of these fields of study. The breadth of those opportunities is easily illustrated by the work associated with the discovery, recovery, and conservation of the *S.S. Central America*. The academic research programs at The Ohio State University have directly benefited from the access to the deep seas that has been provided by the privately funded efforts of Columbus-America Discovery Group. The continuation of these research efforts may well turn on whether the court of appeals' decision is allowed to stand.

The Ohio State University is concerned that the court of appeals' decision will discourage privately funded deep-sea exploration by ensuring that those who recover long-lost shipwrecks will face costly, protracted litigation with insurance companies and underwriters, among others, seeking to share in the fruits of their labors. More importantly, The Ohio State University is concerned that the effect of the court of appeals' decision will be to encourage less scrupulous explorers to secretly plunder shipwrecks and abscond with their treasures.

The Ohio State University is also vitally concerned that under the court of appeals' decision, private discoverers will be less inclined to devote the necessary labor, resources and time to preserving shipwreck sites for research. Thus, if the decision below is allowed to stand, the historic, scientific and cultural values of such shipwrecks could be forever lost to all of us and universities will lose the unique opportunity to undertake educational and scientific endeavors, such as those performed in conjunction with the *S.S. Central America* Project.

For these reasons, the Court should grant this motion for leave to file the attached brief *amicus curiae* in support of the petitioner.

Respectfully submitted,

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February 1993

QUESTION PRESENTED

May admiralty courts continue to infer abandonment of long-lost shipwrecks from the passage of many decades, non-use, and all other relevant facts and circumstances, and accordingly award ownership of a shipwreck to those who discover, recover and conserve it under the law of finds; or must courts award title to purported insurers and their successors who claim ownership of a shipwreck under the law of salvage on grounds that abandonment can never be found absent clear and convincing evidence that the purported owners expressly renounced title?

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BRIEF AMICUS CURIAE OF THE OHIO STATE UNIVERSITY IN SUPPORT OF PETITIONER

INTEREST OF THE AMICUS CURIAE

The Ohio State University is a public institution of higher learning whose main campus is in Columbus, Ohio. It has 4,461 faculty members and approximately 58,585 students in its various colleges and graduate schools. Since its founding in 1870, The Ohio State University has sought to encourage learning, research, and the dissemination of knowledge in virtually all fields of study, including social science, physical science, liberal arts, the professions, business, and finance.

The academic research programs at The Ohio State University, like the research programs at many other colleges and universities across the country, have directly benefited from the access to the deep seas that has

been provided by the privately funded exploratory efforts of the Columbus-America Discovery Group. The Ohio State University therefore respectfully requests that the Court grant the petition for certiorari in this case for two reasons.

First, The Ohio State University is concerned that the court of appeals' decision will discourage privately funded deep-sea exploration by ensuring that those who recover long-lost shipwrecks will face costly, protracted litigation with insurance companies and underwriters seeking to share in the fruits of their labors. Second, and perhaps more importantly, The Ohio State University is concerned that the court of appeals' decision will encourage less scrupulous explorers to secretly plunder shipwrecks and abscond with their treasures in an attempt to avoid those that, under the lax rule applied by the Fourth Circuit, would inevitably seek to share in the fruits of someone else's labors. The historic, scientific and cultural values of such shipwrecks could be forever lost to mankind.

In contrast to the Fourth Circuit's opinion, the trial court's decision provides stability and needed assurance to deep-sea explorers that their efforts, if successful and carried out responsibly, will be fully rewarded financially. Of greater importance, the trial court's decision encourages participation in deep-sea exploration by a broad spectrum of groups, including those that see shipwrecks not only as sources of material wealth, but also as storehouses of scientific and archaeological information to be shared, with benefits to all.

THE PETITION FOR CERTIORARI SHOULD BE GRANTED

I. THE COURT SHOULD GRANT REVIEW BECAUSE THE ISSUE PRESENTED IN THIS CASE VITALLY AFFECTS MANY EDUCATIONAL CONCERNS IMPACTING INSTITUTIONS OF HIGHER LEARNING ACROSS THE NATION

A. Long-Lost and Abandoned Shipwrecks Offer Enormous Opportunities for Research in Many Fields of Study

The breadth of opportunities for research offered by long-lost and abandoned shipwrecks is exemplified by the work associated with the discovery, recovery, and conservation of the *S.S. Central America*. Many of the academic departments of The Ohio State University, including students and faculty, have taken advantage of the shipwreck project to conduct invaluable research. The ability and willingness of Columbus-America Discovery Group to permit that research by the university stemmed from the Group's unencumbered rights in the shipwreck—rights that have now been brought into question by the court of appeals' decision.

The professors and departments at The Ohio State University that have been involved with the *S.S. Central America* project are as numerous as they are diverse. They include:

Professor	*Department*	*Studies*
Dr. Keith Bedford	Civil Engineering	ocean & sediment dynamics
Dr. John M. Cassady	College of Pharmacy	pharmacological screening of sponge
Dr. Charles F. Cole	Natural Resources	deep-sea fishes, fisheries
Dr. George Disterdick	Veterinary Hospital	x-ray analysis of wood from shipwreck
Dr. Rosanne Fortner	Natural Resources & Science Education	marine education

Professor	*Department*	*Studies*
Dr. David K. Ho	College of Pharmacy	pharmacological screening of sponge tissue
Dr. Kathryn A. Jakes	Textiles & Clothing	textile preservation
Dr. Lawrence Krissek	Geological Sciences	deep-sea sediments
Dr. Glyn Meyrick	Material Science and Engineering	metals analysis
Dr. Robert Pfister	Microbiology	marine microbiology
Dr. Jeffrey M. Reutter	Sea Grant & Zoology	marine education
Dr. Susan Smialowska	Metallurgical Engineering	metal corrosion
Dr. George R. St. Pierre	Material Science and Engineering	iron corrosion
Dr. David H. Stansbery	Zoology & Museum of Biodiversity	deep-sea mollusks
Dr. Ronald L. Stuckey	Plant Science	aquatic plants, biogeography
Dr. Thomas Waters	Zoology & Museum of Biodiversity	deep-sea mollusks

The continuation of these research efforts may well depend upon whether the court of appeals' decision is left to stand. The Ohio State University respectfully urges the Court to grant the petition for certiorari, so that institutions of higher learning will continue to have access to the research opportunities that existed prior to the Fourth Circuit's opinion. President of The Ohio State University, E. Gordon Gee, succinctly stated the importance of deep-ocean shipwrecks to institutions of higher learning in a letter to the Fourth Circuit urging reconsideration of its decision:

> Academic research programs at The Ohio State University and other institutions are benefiting from access to the deep ocean provided by the privately funded efforts of Columbus-America Discovery Group, Inc. Because of the immense opportunity to add to our storehouse of knowledge through continued pri-

> vate exploration of the deep ocean, I respectfully request that The Ohio State University, along with other similarly situated academic instiutions, be permitted to join in a brief, *amicus curiae*, in favor of this matter of vital public interest.

(Letter of E. Gordon Gee to Bert Montague, Clerk, United States Court of Appeals for the Fourth Circuit of 9/21/92, at 2.)

Under the law expressed by the district court, and as applied by other circuits and state supreme courts, cooperative research efforts among scholars, students, and private discoverers had been assured of continuing. Private discoverers have been willing to participate in these cooperative efforts because they knew they would be able to enjoy the full benefit of the financial rewards of their efforts. The court of appeals' decision will inevitably chill that cooperative spirit by reducing the financial rewards available to private discoverers. Those discoverers will be required to bear the unrealistic burden of proving that property lost at sea for centuries was "abandoned" by an express disclaimer of title, or risk losing much, if not all, of their financial reward. In any event, discoverers will face substantial uncertainty about title that will make commercial financing for such projects impossible and private venture financing problematic.

B. Legal Predictability Is Essential to Continued Participation by Scholars and Academicians in Deep Ocean Exploration, and Will Advance Study and Conservation of Long-Lost and Abandoned Shipwrecks

One of the most insidious implications of the court of appeals' decision will be to encourage some private discoverers to "cut corners" and exclude participation by scholars and academicians, so as to minimize the risks that their discoveries will become widely-known and that they may then have to share their financial rewards with others. The participation of various academic disciplines

has led to appropriate recognition of the archaeologic, historic, and scientific attributes of the entireties of shipwreck sites. Those values will be jeopardized if private discoverers' efforts are subject to unpredictable division and distribution, among claims scores of years old, upon the discoverers' return to shore.

A key to gaining information hidden within a long-lost shipwreck is to study the site as a whole. This requires understanding the complete shipwreck site, not simply treating it as a place to "recover a lot of stuff" having transitory salvaged commercial value. *The Sea Remembers* 26 (Peter Throckmorton ed., 1987). Proper historical analysis of shipwrecks demands that particular items from the site be studied in relation to everything else at the site:

> Until something on the bottom was understood in its relationship to everything else, it stayed on the bottom. Recovery could take place only when everything on the site was well recorded, in place. The sequence would be surveying, drawing, photography, and more drawing with the help of photography.

Id.

As cultural deposits, shipwrecks provide valuable information about history, commerce, and warfare. We learn not only from their cargoes, but also from their structures, and from the utensils, plates, glassware, cutlery and clothing found aboard such wrecks. "As such they can be understood as potential museums of temporal context preserving a collection of items and also a narrative segment of history which their routes, logs, and wreckage present to the archaeologists as a unique challenge to preserve. In some cases they provide extremely rare evidence." Anne G. Giesecke, *Shipwrecks: The Past in the Present*, 15 Coastal Management 179, 180 (1987). Beyond the archaeological and historical benefits of exploring the intact shipwreck site as a whole, natural scientists gain invaluable insights to understanding the undersea eco-system through careful recording and cataloguing of data from the site.

Under the court of appeals' decision, private discoverers will be less inclined to devote the necessary man-hours and equipment time to preserving shipwreck sites for appropriately conducted research, and more inclined to hide their finds or information about them. The lack of concern that the world's insurance underwriters have for the historic and scientific value of shipwrecks and shipwreck sites is underscored by the fact that the standard salvage agreement used by marine underwriters places no duty upon the salvor to protect the scientific, historic, or archaeological value of the shipwreck site or its artifacts, and, on the contrary, is based on the rule of "no cure, no pay." *See generally* Nicholas J. J. Gaskell, *The 1989 Salvage Convention and the Lloyd's Open Salvage Agreement*, 16 Tul. Mar. L. J. 1 (1992).

Even more disturbing is the prospect that discoverers may seek to avoid the cumbersome and costly litigation created by the Fourth Circuit's approach altogether, by secreting their finds or hiding information. While nothing can fully prevent the unscrupulous in any endeavor, the law should encourage those who responsibly seek to protect the scientific, historic and archaeological attributes of shipwreck sites—and at the very least, the law should not penalize inquiry into such information or provide an incentive to secrete finds. One very important way to ensure the continued sharing of that access is to allow those who bear the enormous financial risk of shipwreck discovery and recovery to reap their full financial reward.

II. THE COURT SHOULD GRANT REVIEW BECAUSE THE DECISION BELOW CREATES A CONFLICT AMONG THE CIRCUIT COURTS OF APPEAL AND THE STATES, THUS FOSTERING UNCERTAINTY AND UNDERMINING INCENTIVES FOR PRIVATE EXPLORATION OF THE DEEP SEAS, AND IMPEDING REALIZATION OF THE RESEARCH AND EDUCATIONAL POTENTIAL OF LONG-LOST AND ABANDONED SHIPWRECKS

A. Whether Admiralty Courts May Infer Abandonment of Long-Lost Shipwrecks Based Upon Passage of Time, Non-use and Other Facts and Circumstances Presents an Important Federal Question Affecting Developing Technologies for Maritime Exploration and Preservation

The Fourth Circuit's decision comes at a time when the question of abandonment of long-lost shipwrecks, and the national importance of marine technology and ocean sciences for exploring, recovering and conserving shipwrecks and other resources, have been expressly recognized by the Congress and the President. Approximately 50,000 shipwrecks are located within the navigable waters of the United States, and many have historical and other significance. H.R. Rep. No. 514(I), 100th Cong., 2nd Sess. 1 (1988), *reprinted in* 1988 U.S.C.C.A.N. 365. Many more are located in international waters.

Technological advances have made access to shipwrecks easier, creating greater interest in them. *Id.* A variety of groups, including historians, explorers, archaeologists, scientists, divers, salvors, and the general public, are affected by the immediate "recreational, preservation and commercial" considerations of historic shipwrecks. Such shipwrecks may contain both historic and scientific information, as well as artifacts—all of which are subject to being destroyed and lost to present and future generations forever. *See id., reprinted in* 1988 U.S.C.C.A.N. at 366.

The national importance of the question of abandonment of long-lost shipwrecks, and the development of marine technology for exploring these and other ocean resources, is illustrated by legislation enacted by Congress with the President's approval. *See, e.g.*, Abandoned Shipwreck Act of 1987, 43 U.S.C. §§ 2101-2106 (Supp. 1992). As expressed by Congress, it is the policy of the United States to encourage private investment enterprise in exploration, technological development, marine commerce and utilization of ocean resources, including development and improvement of vehicles, equipment and instruments for such exploration, research and recovery. 33 U.S.C. § 1101(b)(3), (6) (1988). Twenty-seven states have passed legislation concerning historic shipwrecks.

The issues associated with abandoned shipwrecks have been the subject of much litigation in both state and federal courts, and the importance of the issue promises to continue. *See* H.R. Rep. No. 514(I), 100th Cong., 2nd Sess. 1, *reprinted in* 1988 U.S.C.C.A.N. 365. The legislative history of the Abandoned Shipwreck Act underscores this assertion:

> The Committee notes that the term "abandoned" does not require the original owner to actively disclaim title or ownership. The abandonment or relinquishment of ownership rights may be implied or otherwise inferred, as by an owner never asserting any control over or otherwise indicating his claim of possession of the shipwreck.

Id. The question of abandonment is central to the legislation:

> Abandoned shipwrecks within the scope of this Act include those which have been deserted and to which the owner has relinquished all ownership rights. Except in the case of U.S. warships or other public vessels (which require an affirmative act of abandonment), the act of abandonment may be implied or inferred from the circumstances of the shipwreck as

> when an owner has never asserted any control over or otherwise indicated a claim of possession.

H.R. Rep. No. 514(II), 100th Cong., 2nd Sess. 1, 5 (1988), *reprinted in* 1988 U.S.C.C.A.N. 370, 374.

B. The Decision Below Creates a Conflict With Other Circuit Courts and State Supreme Courts Concerning Whether Admiralty Courts May Continue to Infer Abandonment of Long-Lost Shipwrecks Based Upon Circumstantial Evidence

The Fourth Circuit's decision is in conflict with the opinions of the First, Fifth and Eleventh Circuits, which allow admiralty courts to infer abandonment of long-lost shipwrecks based on circumstantial evidence, such as the passage of time, non-use, and other facts. *See, e.g., Treasure Salvors v. Unidentified Wrecked and Abandoned Sailing Vessel*, 569 F.2d 330, 337 (5th Cir. 1978). *See also Martha's Vineyard Scuba Headquarters, Inc. v. Unidentified, Wrecked and Abandoned Steam Vessel*, 833 F.2d 1059, 1065 (1st Cir. 1987); *Klein v. Unidentified Wrecked and Abandoned Sailing Vessel*, 758 F.2d 1511, 1514 (11th Cir. 1985); *Treasure Salvors, Inc. v. Unidentified Wrecked and Abandoned Sailing Vessel*, 640 F.2d 560, 567 (5th Cir. 1981).

The vast majority of district courts, and all the state supreme courts, recognize the propriety of inferring abandonment, even absent an express renunciation of title by a claimant to ownership. *Indian River Recovery Co. v. The China*, 645 F. Supp. 141, 144 (D. Del. 1986); *Massachusetts v. Maritime Underwater Surveys, Inc.*, 531 N.E.2d 549, 552 (Mass. 1988); *Chance v. Certain Artifacts Found and Salvaged*, 606 F. Supp. 801, 804 (S.D. Ga. 1984), *aff'd without opinion*, 775 F.2d 302 (11th Cir. 1985). This is the appropriate rule, both based on the weight of precedent and the policy considerations underlying that precedent.

CONCLUSION

For all of the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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